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Attorneys for Respondents.

L. A. No. 9165

In the Supreme Court

OF THE

State of California

AGLAE S. CAPUCCIO,
Plaintiff and Appellant,

vs.

ARTHUR J. CAIRE et al.,
[Defendants other than Edmund A. Rossi],
Defendants and Respondents,

EDMUND A. ROSSI,
Defendant and Appellant.

APPELLANTS' OPENING BRIEF

On Appeal From Certain Portions of the Final Decree of the Superior Court of the State of California, in and for the County of Santa Barbara.

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STATEMENT OF THE CASE.

This is an appeal by plaintiff and defendant, Edmund A. Rossi, from the final decree herein. The action is in partition. It is the third appeal in this action taken to this court. The

first appeal was by defendants, other than Edmund A. Rossi, from the interlocutory decree, which was affirmed. (*Capuccio v. Caire,* 189 Cal. 514.) The second appeal was also taken by defendants, other than Edmund A. Rossi, from an order refusing to modify the interlocutory decree after affirmance by the Supreme Court. A motion was made in this court by the plaintiff and defendant, Edmund A. Rossi, to dismiss that appeal upon the ground that the order appealed from was a non-appealable order. After argument this motion was granted from the bench. No written opinion was filed. The facts occurring prior to the date of and down to and including the signing of the interlocutory decree are fully and fairly stated in *Capuccio v. Caire,* supra, and it is, therefore, unnecessary to repeat them here.

The facts pertinent upon this appeal are briefly as follows:

Subsequent to the making and filing by the Referees of their report herein, the plaintiff and defendant, Edmund A. Rossi, made a motion to change and modify that report. The motion was denied. The proceedings on this motion are set out in the transcript on file herein. Following the denial of the last mentioned motion, the plaintiff moved the

court, under the provisions of Section 796 C. C. P. for an order making an allowance to plaintiff, of reasonable counsel fees. This motion was objected to by the defendants, other than Edmund A. Rossi, and the objections were sustained. The proceedings on this motion are likewise set out in a bill of exceptions, which appears in the transcript.

This court is now asked to review matters of law and fact which occurred subsequent to the affirmance of the interlocutory decree, and wherein the appellants claim prejudicial error has occurred.

POINT I.

THE COURT ERRED IN SUSTAINING THE OBJECTIONS TO PLAINTIFF'S MOTION FOR AN ALLOWANCE OF COUNSEL FEES AND IN REFUSING TO HEAR EVIDENCE IN SUPPORT OF THE MOTION.

The plaintiff moved the court for an order making an allowance of counsel fees "in accordance with the provisions of Section 796 C. C. P." (Tr. 198, fol. 592.)

Section 796 C. C. P. is as follows:

> "The costs of partition, *including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit,* fees of referees, and other disbursements, *must be paid by the*

> *parties respectively entitled to share in the lands divided, in proportion to their respective interests therein,* and may be included and specified in the judgment. In that case they shall be a lien on the several shares and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation, to be paid by the parties thereto, or any of them." (Italics ours.)

It will be observed that plaintiff's motion was for an allowance of counsel fees in accordance with the terms of the foregoing section. The bill of exceptions shows that the plaintiff made his motion in open court in the language of Section 796 C. C. P., in other words, the record shows a motion made by plaintiff for an allowance of reasonable fees expended by the plaintiff for the common benefit. Plaintiff's counsel in support of the motion, produced a witness, but the court refused the witness to be sworn, or hear any evidence whatsoever. This was plainly error.

Counsel for defendants, other than Edmund A. Rossi, objected to the allowance of any counsel fees. The grounds of objection were: "That no such motion is known to our

law or to the Code; the motion is not predicated upon any counsel fees expended or is it predicated upon any counsel fees or services rendered for the common benefit and again, Section 796 C. C. P. is not and was never intended to apply to contested cases of partition. That counsel fees under Section 796 C. C. P. could not be allowed in adversary or contested proceedings where the various parties are represented by their counsel. They are asking reasonable counsel fees for the plaintiff, not for reasonable counsel fees expended by plaintiff for the common benefit." (Tr. p. 108, fols. 593-4.)

Counsel for defendants, by their objections to the form of the motion, show a clear misunderstanding of the position of plaintiff. The transcript shows distinctly that the motion made to the court was for an allowance of counsel fees *in accordance with the provisions of Section 796 C. C. P.,* and therefore, it conformed exactly to the law provided for a proceeding of this sort. The objection which was argued and considered by the court was, the claim that Section 796 C. C. P. is not and never was intended to apply to contested cases of partition. The opinion of the lower court printed as an appendix to this brief shows that the question arising on this

point is: Did the learned judge of the court below err in deciding that Section 796 C. C. P. does not apply to contested cases? or, stated differently; Does that section apply only to friendly suits that are uncontested? The section makes no distinction in its terms between amicable and contested actions. The court, however, refused to hear any evidence at all upon plaintiff's motion for an allowance of counsel fees.

Even a superficial reading of the opinion will show that the learned judge of the lower court entirely misunderstood the contention of appellant. At the outset, the opinion proceeds to discuss whether or not the plaintiff did or did not "expend" any counsel fees. The court allowed plaintiff no opportunity of presenting evidence that such expenditure was made. It follows that the court clearly erred in refusing to hear any evidence on this subject. (Tr. 199, fol. 596.)

The cases cited by the learned trial judge in his opinion on the power to allow counsel fees, construe statutes which differ from Section 796 C. C. P. of California. The authority which, in our opinion, concludes the point of law involved in this part of our appeal is,

Watson v. Sutro, 103 Cal. 170.

In that case the question whether it is proper to allow fees to the plaintiff and to assess any part of the fees against defendants in a contested case was squarely presented to this court. An examination of the record in that case shows that *this point was the sole question argued in a brief filed by counsel for Sutro in that case.* The opinion of Mr. Justice Garoutte states the case as follows:

> "This is an appeal by Adolph Sutro from that part of a judgment in a partition proceedings that awards to plaintiff in the action an attorney fee of $5000. In the trial of the action of partition the amount of the respective equitable interests of plaintiff and appellant Sutro to the realty involved in the litigation was warmly contested, and as to such matters the litigation resulted adversely to this appellant.
>
> At the hearing, the report of the Referees was acquiesced in by all the parties in interest, and the only contest that was made was as to the amount which should be allowed to plaintiff under Section 796 of the Code of Civil Procedure for reasonable counsel fees expended by him for the common benefit. The court, after hearing the testimony of 19 witnesses, fixed the fee at $5000, and determined that defendant Sutro's proportion was $4828.25; *and the propriety of this order is the sole question involved in this appeal.*" (Italics ours.)

The judgment was affirmed.

It will be observed that the court states that it is "the propriety of the order" which was challenged and not merely the *amount* of the fee.

It will likewise be noted that Section 796 C. C. P. provides that reasonable counsel fees MUST be paid by the parties entitled to share in the lands divided in proportion to their respective interests therein. It is, therefore, mandatory upon the lower court to allow counsel fees when incurred for the common benefit. Its discretion goes to the *amount* of the allowance only. There are but two things in Section 796 C. C. P. to guide the court in determining the allowance of counsel fees and the amount thereof:

(a) The fees must be reasonable, and

(b) The services rendered for which fees are allowed, "for the common benefit." That is, for the "benefit" of all parties interested in the premises to be partitioned. And any service which furthers or aids the parcelling or sale of the property is for the common benefit.

There is absolutely nothing in Section 796 C. C. P. which makes the allowance of counsel fees to "plaintiff or either of the defend-

ants" dependent upon anything other than the conditions named. Any other conclusion would be purely judicial legislation. The fact that the action was controverted emphasized the necessity for the allowance of counsel fees to plaintiff. It is inconceivable that because a defendant contests plaintiff's title and places her to endless trouble and expense to make good that title and to obtain a segregated parcel of land, something that the courts have always favored, she should be penalized by having to bear all of the extra expense necessarily incurred in securing that which the court finds she was entitled to, i. e., a decree of partition. This would make it to defendants' interest to contest every action for partition and thus avoid the expenses of partition and place the whole burden on plaintiff.

The record in the case shows (Tr. pp. 67-68, fols. 110-111) that the Referees' expenses and fees, amounting to $61,691.87 or thereabouts, were assessed against respondents "in proportion to their respective interests," *and these fees and expenses were included in the final decree and paid by respondents without question.* But the Code makes no distinction between Referees' fees and counsel fees and other disbursements, all of which "must" be paid by all the parties. If the mere fact

that respondents objected to a partition and denied plaintiff's title is to *ipso facto* excuse defendants from participation in the expense of plaintiff's counsel, then by the same token why should it not also relieve them from bearing the heavy expense of the Referees in making a partition which they did not desire and warmly contested?

The lower court has cited several cases from other jurisdictions to sustain its conclusion. Most of these cases were before the Supreme Court in *Watson v. Sutro,* 103 Cal. 170, and none of them was held worthy of particular notice. This was obviously so because the decisions of other states would be of little practical assistance in construing the different statute of this state. It is the statute and decisions of *this* state which control. The decisions of other states are of little aid in construing Section 796 C. C. P.

We have found but one case and only one construing a section identical in language and, we might say, adopted verbatim from the California statute. This is in the Utah case of

Murray v. Hayes, 51 Utah, 211, 169 Pac. 264.

The Supreme Court of Utah placed the same construction on the Utah statute as this court

did on our statute in *Watson v. Sutro.* It affirmed an allowance of counsel fees to plaintiff, although the action was contested and an appeal taken on that ground.

The learned judge of the lower court tries to explain away the conclusive effect of *Watson v. Sutro,* supra, by stating that the only thing decided in that case was the reasonableness of the amount of the fee, and held that such a fee was not allowable in a controverted case in partition. We have already noted that there is nothing said in Section 796 about a controverted proceeding in partition, and not only does the court's opinion in *Watson v. Sutro,* supra, show that it was a controverted proceeding, but an examination of the record shows that the very objection made in this case was urged upon this court in that case. It is difficult to understand how the *reasonableness* of the fee could be the only question involved, if the court did not have *the right* to allow a fee at all.

It is now upwards of 32 years since *Watson v. Sutro,* supra, placed the construction upon this section, which we contend is the proper one, and it is over 50 years since the legal profession has believed the section to mean what it says and to have understood the construction placed upon it by the last named

case, and in the more than fifty years that section has been in force, no case has held otherwise.

POINT II.

THE PARTITION IS INEQUITABLE AND ERRONEOUS IN SEVERAL RESPECTS.

We come now to that portion of our appeal which deals with the actual partition and the proceedings in connection therewith.

Firstly, a word with regard to the final decree. This decree was prepared by counsel for respondents and was not seen by appellants before its execution. Although a muniment of title in which all the parties are necessarily interested, the first notice of the signing and filing of this final decree came to appellants through reading about it in a Santa Barbara newspaper.

The grounds of the motion for a modification of the Referees' report briefly were:

1. That there is no safe means of ingress or egress from that portion of the Island allotted to the appellants.

2. That the only feasible and practicable wharf or harbor, and the only wharf on said Island is at Prisoners Harbor, on Tract No. 5 as shown on the Referees' map.

3. That no detriment will be suffered or sustained by any of the parties to the action by allowing, as we request, a public road through their land or requiring the operation of the only existing wharf as a public wharf, and that unless this is done and means of access to the use of such wharf is given, the lands allotted to the appellants will be useless.

4. That the land having frontage on the northerly coast of the Island and particularly described as being between Punta Diablo on the west and the easterly portion of Prisoners Harbor is singularly valuable because of the unsurpassed scenic beauty and the special purposes to which that sort of land may be beneficially used.

5. That all of the land, except that just mentioned, is primarily valuable for agricultural, horticultural, viticultural, grazing, sheep and cattle raising and purposes other than those mentioned in paragraph 4.

6. That the lands awarded to appellants are and each of them is of less value in the aggregate than 14/100ths quality and quantity considered of the whole of said property. (Tr. p. 135, fols. 403-8.)

The motion was denied *in toto*.

(a) The Court Exceeded its Jurisdiction in Granting Appellants the Right to Wharf Out.

The judgment of the court is that a right of way along the present travelled road or such road as may be laid out in lieu thereof over said Tract No. 6 allotted to plaintiff to and connecting with Scorpion Harbor, together with the right to wharf out into Scorpion Harbor for the use and benefit of Tract No. 7, allotted by said Referees to said Edmund A. Rossi, in common with the allottee of said tract No. 6, namely the said Aglae S. Capuccio, be and the same is hereby granted.

We claim that this portion of the judgment is null and void as being in excess of the jurisdiction of the court, because it is beyond the power and authority of any court to confer a right to wharf out into navigable waters. The right to wharf out in this state is a matter governed by statute. To wharf out one must obtain legislative sanction. Sections 528 and 531 C. C. govern.

> "In the other case, (Central P. R. R. Co. v. Pearson, 35 Cal. 247) the lots of one of the defendants bordered on the Sacramento River, and one reason for reversing the judgment was that evidence had been admitted to the effect that 'in connection with the Sacramento River she claimed the right to wharf out, and erect landings and warehouses.' The Court referred to this as 'wharf privileges' and said in substance that the right to erect a wharf was something to which the owner had not a right unless a franchise therefor were granted by the state, and that no franchise might ever be granted."
>
> *San Diego Land, etc., v. Neale,* 78 Cal. 67.

See also:

> *People v. S. P. Co.,* 166 Cal. 627-629.

It follows that the portion of the final decree which purports to give appellants the right to build a wharf out into the ocean is beyond the power of the court. The court denied appellants a right of way over Parcel No. 5 and the right to use the present wharf at Prisoners Harbor and gave them in lieu of that absolute right, a barren and worthless paper privilege of wharfing out into the ocean at their own expense of from $10,000 to $25,000. (Tr. p. 148, fol. 444.)

(b) The Court Erred in Refusing to Grant Appellants a Right of Way Over the Existing Trail and Road From Parcels 6 and 7 to Prisoners Harbor, Together With the Right to Use the Existing Wharf.

The decree cuts off appellants from using the only existing means of ingress and egress for freight, livestock and passengers from the mainland. The use of the wharf at Prisoners Harbor is indispensable under existing

conditions to the use of the land allotted the appellants. Accordingly the court should have granted the appellants the privilege of using a way or road to and over Parcel No. 5 to reach this wharf.

Appellants do not ask that a road or way be built at respondents' expense, nor did they seek the construction of a road or way from Tracts 6 and 7 over and across Parcel 5 to Prisoners Harbor. All that is demanded is an easement over Parcel 5 together with the right to use the only wharf on the entire Island. (Tr. p. 146, fol. 436.) (See Partition Map, Tr. p. 136.) All the other parcels have been given the right of way and use of the wharf with less reason than that asserted by appellants as justifying the same right. It is certainly just as essential to Tracts 6 and 7 that they should have, and each of them should have, the same privilege that is given to the allottees of Tracts 1, 2, 3 and 4.

Appellants seek a public right of way and ask that the use be dedicated to the public. There is no legal obstacle to this procedure. Section 764 C. C. P. sanctions it.

Sound economic grounds dictate, and efficiency of operation make unanswerable the proposition that there should be but one main port to a property of this kind, and that all

of the tenants in common should have the right to its use. This is emphasized by the fact that but one harbor has been used for fifty years.

The existence of a right of way giving access to Prisoners Harbor from the appellants' parcels, by giving the right to the public to visit the Island would greatly enhance the value of the whole property, including the respondents', by extending the knowledge of the property to the public at large.

The testimony shows that the cost of constructing a wharf at Scorpion is prohibitive and out of all proportion to the Referees' appraisal of $48,503 and $44,574.45 for Tracts 6 and 7 respectively. (Tr. p. 152.) The estimate of the Referees was that the cost would, even were the building of a wharf legally possible, be from ten to twenty-five thousand dollars. Aside from the legal impediment this would be unreasonably disproportionate to the total value of the allotment. In such cases it has been held that an easement of implied necessity is created.

Smith v. Griffin, 14 Colo. 429; 23 Pac. 905;

Pettingill v. Potter, 90 Mass. 1; 85 Am. Dec. 671;

Blum v. Weston, 102 Cal. ~~326.~~ 362

The principle underlying the creation of a way of necessity is that whenever property is conveyed to another, there is necessarily conveyed whatever easement is required for its beneficial use and as in the case of implication of easements generally, a right of way of necessity may arise where the severance of land is effected by judicial proceedings. (*Blum v. Weston,* supra.)

The decree, based on the report of the Referees, leaves the existence of the right of way by necessity in doubt, even if it does not deny this right to the appellants. The decree and report expressly grant such easement to the allottees of Parcels 1, 2, 3 and 4, and the silence of the decree and report on the subject may well be construed as a denial of such way to the allottees of Parcels 6 and 7.

The record and partition map show without conflict that there is no wharf for the shipment or receipt of freight on any portion of the lands allotted to appellants. (Tr. p. 157, fol. 471.) The two parcels on the east end are suited to about the same practical purposes as the rest of the Island (Tr. p. 138, fol. 413) namely, for sheep and cattle grazing. Mr. Clifford McElrath, a former superintendent, testified that no cattle had ever been shipped from Scorpion Harbor so

far as he could remember (Tr. p. 159, fol. 477) but must be driven out overland to Prisoners Harbor. (Tr. p. 158, fol. 473.) This testimony stands uncontradicted in any way.

It is impossible for appellants to devote the parcels of property assigned to them by the final decree to any beneficial use without a wharf. Referee Flournoy, a qualified civil engineer, estimated that it would cost $25,000 to construct a wharf at which a boat large enough to transport cattle could land with safety. (Tr. p. 148, fol. 444.) However, no soundings were taken or survey made of the nature of the ocean bottom at Scorpion (Tr. p. 165, fol. 495) and it is not known whether it is hard, soft, sandy, or rocky or whether the water is deep or shallow. On the other hand, the Referees' report shows that the water in some places is 100 feet deep at the base of the cliffs and the coast line is nearly all precipitous cliffs rising almost vertically from the water's edge. (Tr. p. 119, fol. 357.) The denial of the privilege to appellants is all the more unjust in view of the fact that the Referees granted the right to all of the respondents. (Tr. p. 123, fols. 368, 369.)

That the court misapprehended the appellants' position is best shown by its words:

"I don't think that a road should be built. I believe the evidence shows satisfactorily that these harbors could be utilized in the way and manner as testified to and with a reasonable amount of expense, *probably less expense than to construct a road.* The objections to the report will be overruled. The motion is denied." (Tr. p. 180, fols. 539-40.)

The primary thought in the court's mind is evidently that appellants were seeking to compel the respondents to "construct" a road over and across Parcel 5 to Prisoners Harbor for their benefit. We repeat that all that we sought and all that we are seeking is a right of way. (Tr. p. 146, fol. 436.) The same right of way which now exists and which has existed and been used since time immemorial.

(c) Claim of Right of Way and Use of Present Wharf Not Wholly Dependent Upon Necessity.

The appellants do not rest their claim to a right of way over Parcel No. 5 to Prisoners Harbor and the right to use the wharf at that place in common with the respondents entirely upon the ground of necessity. Appellants also rest upon the provisions of Sections 764 C. C. P. and 1084 and 1104 C. C.

There is a combination trail and road now leading from Tracts 6 and 7 to Prisoners

Harbor. (Tr. p. 139, fol. 416.) (Tr. p. 157, fol. 471.) There can be little question that, under these circumstances, if the partition had been a voluntary one the appellants would have been entitled to the privilege, cut off by the court, as being necessary to the reasonable enjoyment of the severed parcels. The authorities are so numerous upon this point that it seems unnecessary to do more than cite the code sections mentioned above and some of the more recent cases on the subject.

Vargas v. Maderos, 191 Cal. 1;
Cheda v. Bodkin, 173 Cal. 7;
Southern Pac. Co. v. Los Angeles M. Co., 177 Cal. 395;
Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412;
9 *Cal. Jur.,* p. 957, Sec. 11; and cases cited;
19 *Corpus Juris,* p. 914, Sec. 103.

The rule is stated in 9 *Cal. Jur.* p. 957 as follows:

> "It is a rule of the common law that where the owner of two tenements sells one of them, *or the owner of an entire estate sells a portion of it,* the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains." (Italics ours.)

(*Mesmer v. Uharriet,* 174 Cal. 110.) As to way of necessity arising from partition, see 5 *Cal. Law. Rev.* 265.

(d) Appellants Did Not Receive 14-100ths of the Property Quantity and Quality Considered.

That region of the Island having frontage on its northerly coast lines and lying particularly between Punta Diablo on the west and the easterly end of Prisoners Harbor on the east is a region of unsurpassed scenic beauty. There is a great demand for property of that kind. (Tr. p. 170, fol. 510.) This stretch of property is so beautiful that we are relying for a description thereof made by Chas. F. Holder in his book entitled "The Channel Islands". We quote from page 265:

> "I shall not soon forget another glimpse I had of the Island. This time we had left Santa Barbara twenty-five miles to the north and the yacht was bounding along across the channel, the wind rising every moment, until, when we were five miles off shore, it seemed to blow half a gale. The skipper held on until it seemed as if we would hit the island. Its well wooded slopes rose before us in a tangle of fog banners, and great masses of silvery foam like mist swept down the side, a glorious and impressive spectacle. We were heading for a mountain, Point Diablo, which extended out into the sea, a mountain of rock and to ram this seemed the object. But our skipper knew his waters. Instead of coming about he kept on. Suddenly the rocky precipice took the wind, the gale left us with just headway enough to guide into a little harbor about four times the length of the yacht, a perfect refuge in almost any wind, with the mountain rising all about, and to the west, not a stone's throw, a pebble beach up from which reached a deep, well wooded canon. There was something magical about it all, as the anchor chain rang down to the hard sandy bottom, and we swung to with just about the safe amount of room.
>
> Coming up from the south on a cruise one is impressed with the fact that Santa Cruz is the best wooded of all the islands, as its slopes are often covered with brush and its canons filled with trees though some parts of it are barren and rocky. We had entered this little harbor on the north coast at Point Diablo to visit the Painted Cave, which has made Santa Cruz famous and the Mecca of many parties from Santa Barbara and Santa Catalina. The cave, more remarkable than the grotto of Capri, is really beneath the mountain, and the following day, while the yacht lay off and on, we took the ladies in the rowboat and pulled in. It was a peculiar illustration of the effect of uncanny places. My friend, the owner of the yacht, could not induce his crew to go into the cave. We first entered a diminutive snug harbor in the kelp and at once faced the great Gothic arch, its entrance. The water here was as smooth as glass, the trade wind not having started up, and the only disturb-

ance was an occasional ground swell that came silently along and found its way into the cave.

It is well called the Painted Cave, as the salts have dyed or colored it in a fantastic manner, in brilliant yellows, soft browns, reds, greens and vivid white. The first room opening from the sea may be sixty or seventy feet high, the walls beautifully colored or painted. From this room we pushed the boat in and in until we came to a dark door or opening somewhat but not much larger than the boat. As we approached, a wave came rolling in, sobbing, hissing, groaning in a strange uncanny manner, and I noticed that as it swept in, it almost closed the entrance. It was not an alluring prospect, and I did not wonder that the men pushed our boat as near the hole as possible and waited for the next roller, and as it filled the entrance we pushed in immediately after it and got through before its successor came along, a proceeding easily accomplished. At once we were in almost absolute darkness, a small vivid eye of light representing the entrance. It has been my good fortune to hear some singular noises in my day, but the pandemonium, worse confounded, in this case under the mountain of Point Diablo, at times exceeded anything I had ever heard.

We had made a flambeau of waste, and tying this to a stick endeavored to see the roof or ceiling; we also attempted to sound the cave, but all to no purpose. I should imagine it was one hundred feet across. I found on the side a ledge and

beyond, and under this, were other caves or passages through which the water went roaring, hissing, and even reverberating in a series of sounds which I could easily understand would demoralize any one with weak nerves. There were two ladies with us. Captain Burnham and I rowed, and our fair passengers were animated with a desire for investigation. I am rather inclined to explorations myself, yet I could not but think that if a particularly heavy earthquake should occur at that time and lower the entrance a foot or two, we should be imprisoned beneath the mountain. As I stepped out on the shelf, screams, yells and shouts seemed to come from the dark unfathomed caves far beyond, and all the evil demons of this sea cave apparently sprang to life. At the same time a particularly big wave came in, filling the entrance completely, and as it went reverberating on into countless other caves, it released myriads of reverberations and echoes until the sound was deafening, confusing and appalling.

The cave was a sea-lions' den. When I stepped onto the ledge I dislodged several by almost stepping on them in the dark, and their barking protests as they dashed out added to the volume of sound. As they swam beneath us the water blazed with phosphorescence, turning the place into a veritable witches' caldron. I crashed two planks together to find out what sound really was, and we could hear it bounding off and far away into the interstices of the mountain in an appalling series of sounds.

Watching our chance, we reversed the operation; the moment a wave came in we pushed the boat through into the dazzling sunshine.

If I should attempt to designate the most striking feature of Santa Cruz I should name its caves, as the entire coast on the water line appears to be cut and perforated by the gnawing sea. Some are large and open; others spout water and air with undisguised ferocity; some merely hiss, growl, and moan as the sea rushes into them; while others again appear so far beneath that the compact merely shakes the rock with a dull heavy reverberation.

The cave known as Cueva Valdez, toward the east end on the north side, is quite as remarkable as the Painted Cave. It is partly on land, and will hold several hundred people. One entrance opens on the little bay, really a very good harbor; the other on a sandy canon that leads up into the mountains; and there is a trail along the rocky shore to the east.

Almost everywhere I found the black earth and the shell heaps of the ancient inhabitants. There were literally hundreds of such places, and in the canon I found a little stream that was cutting its way through an ancient burial ground. Visitors are not particularly desired unless they come accredited from some one, so I imagine that a systematic search at Santa Cruz would result in the discovery of a vast amount of Indian implements. At the west we found large deposits of abalone shells."

"The Channel Islands of California," by Charles F. Holder, A. C. McClurg & Co., Publishers.

None of this scenic property was allotted to appellants, *nor was its useful purpose taken into account by the Referees.* In this respect the Referees utterly disregarded the settled law in this state.

> "In arriving at the value of land it is proper to take into consideration every use to which it was naturally adapted and which would enhance its value in the estimation of persons generally, purchasing in the open market. The question is not what its value is for a particular purpose, but its value in view of all of the purposes to which it is naturally adapted."
>
> *Sac., etc., R. R. Co. v. Heilborn,* 156 Cal. 408; 101 Pac. 979;
>
> *Yolo Water & Power Co. v. Hudson,* 182 Cal. 48; 186 Pac. 772;
>
> *Wild Goose C. C. (a corp.) v. County of Butte,* 60 Cal. App. Rep. 341.

The wonderful scenic property was given in its entirety to the respondents. It constitutes one of the main values of the property and yet when the Referees were asked if the potential uses of the property had been taken into consideration, the reply was "No". (Tr. p. 167, fols. 501-2.) Without taking these important factors into consideration it is

obviously impossible to partition the property equitably with any regard to quantity and quality. It is well enough for the Referees to have informed the court that everything which they could think of was taken into consideration, but the unjustness of their allotments is established by the Referees' own admissions that they placed no values on scenery nor gave any consideration to the useful purposes of any of the various tracts. The testimony of Referee Doulton that they "took them (various parcels) as they were" (Tr. p. 168, fol. 502) is sufficient. The testimony of Referee McComber was the same. (Tr. p. 170, fol. 509.) The redirect examination of Referee Flournoy (Tr. p. 148, fols. 442-444) is instructive. Just how this Referee could make an allowance to appellants for depriving them of their interest in the world famous "Painted Cave" without even having seen it, is more than we can understand. The basis of the Referees' apportionment is shown on a memorandum introduced as Plaintiff's Exhibit 11 and appears at pages 150 to 152 of the transcript. This shows conclusively that nothing but land was valued on an acreage basis without allowance to appellants for scenic values or for deprivation of right of way or wharfage rights at Prisoners Harbor. We do not question the good faith

of the Referees, but we are not, of course, here dealing with intentions or motives, but with that only which the Referees have done.

In their motion the appellants pointed out that the division made by the Referees and confirmed by the court is purely an agricultural one. The evidence sustains this. The tabulation showing the respective values is set out in the transcript at page 150, et seq. Comparing the allotment for either Parcel 6 or 7 with allotment 1, which was for the same fraction as a tenancy in common, it must always be remembered that the celebrated Painted Cave is upon that parcel, while Parcels 6 and 7 are burdened with the building of a $25,000 wharf at Scorpion Harbor, (which as we have seen, is beyond the juridical power of the court to permit) shows on its face how unjust and unfair this division is.

Another matter which should not escape observation is that the pleadings concede the property as having a market value in excess of one million dollars. It would seem to follow that since the Referees placed an agricultural value on the whole property at $600,000 (Tr. p. 150, fol. 448) that the difference between the first mentioned amount and the latter must certainly cover, in part at least, the monetary value not measured by the ag-

ricultural one, and it must necessarily include the scenic property hereinabove described and none of which was given to these appellants.

As being somewhat illuminating upon the care exercised in partitioning this property, it should not be overlooked that one of the Referees testified that he had "taken everything" into consideration, but admitted that he had never seen the Painted Cave. We are told by another of the Referees that the appellants were "getting the cream". (Tr. p. 168, fol. 503.) We do not know what kind of "cream" this Referee had in mind. Another example of how one of the Referees performed his duties is thus evidenced. "The best land is in Tract 2, but owing to conditions of the wind, you cannot grow anything there. * * * Good crops are raised there." (Tr. p. 144, fols. 431, 432.)

In their report, the Referees dispose of the topography of this principality in one brief sentence. They state that it is mountainous. Perhaps they did not know that such celebrities as Professor LeConte, Professors Greene, Tangier Smith of the University of California, and men of science from the Smithsonian Institute and the State Minerologist (9th Annual Report) of which

this court, of course, takes judicial notice, have made a very exhaustive study of this Island. To them it was not a mere ordinary piece of property such as one would find on the mainland.

Mr. Goodyear, State Minerologist in the 9th Annual Report, writing of his experience and of the property which has been allotted to these appellants, pointed out that it is made up of material of an exclusively volcanic origin. In fact, the Geological map of the State of California, issued by the State Mining Bureau in 1916, shows conclusively that the portion allotted to appellants is exclusively volcanic. A glance at the topographical map in evidence will show that a ridge divides Parcels 6 and 7 from Parcel 5. This ridge is known as the "Montanon". It extends across the Island from Coche Point on the north to Sandstone Point on the south. It is entirely volcanic. In other words it is made up of the same material as that which the Referees justified their recommending that the other side be given ten thousand acres of "waste" land. If this is waste, we also want our share of waste. Since this ridge is made up of the same material as that out of which wastage was granted to the respondents, we submit that all of this ridge

should be included within the boundary lines allotted to appellants. That would cause the boundary line to be at a most convenient point, namely, approaching the narrowest point of the Island.

To emphasize how unfair this partition has been, it might be inquired, is there any "waste" on the Island? In estimating the total valuation thereof, the Referees placed upon the 60,000 acres which make up the whole property, a value of $10 per acre. (Tr. p. 150, fol. 448.) How can it be waste if it is valued at $10 per acre, and if it is valued at $10 per acre and ten thousand acres of wastage are allotted to the other side, certainly the property was not partitioned fairly, quantity and quality considered. In other words, the ten thousand acres of wastage constitute a differential in favor of the respondents of an amount aggregating no less than 1/6th or thereabouts of the area of the entire property. Is it all waste because it is volcanic? Or is that only waste which forms a part of the ridge at the central part of the Island? The geological formation is the same.

It should likewise be remembered that the parties have, as the judgment shows, stipulated that if additional surveying expenses

are to be incurred that they are willing to pay the same.

CONCLUSION.

In conclusion and for the foregoing reasons, it is submitted that the judgment must be reversed with directions to the lower court:

1. To fix a reasonable counsel fee for services rendered for the common benefit on behalf of the plaintiff.

2. That the court direct that provision be made for an easement over and across the parcel of land designated by Referees as Tract 5 from a point in Parcels Nos. 6 or 7 to the wharf at Prisoners Harbor.

3. By providing that the present wharf at Prisoners Harbor or any wharf that may be hereafter constructed in place of it, shall at all times be operated, used and maintained as a public wharf.

4. By subdividing that portion of Santa Cruz Island, particularly described as follows:

Commencing at the promontory or point of land on Santa Barbara Channel known as "Punta Diablo" and running thence easterly

along the shore line to a point distant along said shore line ten thousand (10,000) feet easterly from the present wharf at Prisoners Harbor, thence due south to the summit or crest of the water shed which divides the waters flowing into the Santa Barbara Channel on the north, from the waters which flow into the Pacific Ocean on the south, thence westerly following said water shed to the point designated as "U. S. Mon. Valley Peak" on the Referees' map accompanying their said report on file herein, thence westerly in a straight line to the point designated as "U. S. Mon. Red Peak" on said Referees' map, thence westerly following the crest of the water shed of which said last mentioned peak forms a part, to the summit of the peak known as "Pichaco Diablo", thence in a straight line northerly to the line of commencement, and by allotting to plaintiff a portion of said last mentioned tract having frontage on Santa Barbara Channel equal in value, quality and quantity considered, to 7/100ths of the total value of the tract as subdivided and by allotting to defendant, Edmund A. Rossi, another portion of said tract of the same value, quantity and quality considered, as that to be allotted to the plaintiff. Such allotment to be in addition to the said Parcels six (6) and seven (7) allotted to

them in said Referees' report as filed, and by providing for a public road connecting each of the said tracts with the said wharf at Prisoners Harbor, or

(b) By allotting to the plaintiff and defendant, Edmund A. Rossi, respectively, in lieu of the additional land above referred to, lands adjacent to the said Tracts No. six (6) and seven (7) lying westerly thereof and bounded by a north and south line across said Island approximately eight thousand five hundred (8500) feet westerly from the present boundary between Tract No. five (5) and Tracts No. six (6) and seven (7).

Dated, San Francisco,
March 19, 1926.

Respectfully submitted,
AMBROSE GHERINI,
ORRIN K. MCMURRAY,
JAMES E. LYONS,
Attorneys for Appellants.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

In the Superior Court of the State of California, in and for the County of Santa Barbara

No. 10,812

Aglae S. Capuccio, Plaintiff,

vs.

Arthur J. Caire, et al, Defendants.

Opinion of Trial Court

The plaintiff noticed her motion to be presented to this court for reasonable counsel fees expended by the plaintiff for the common benefit in this case—which is a case of partition of the Santa Cruz Island—for a reasonable counsel fee for the plaintiff for the common benefit under the provisions of Section 796 of the Code of Civil Procedure, which is as follows:

"The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of Referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands di-

vided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties."

The defendants objected to the allowance of any counsel fees under the said section on the following grounds:

(a) That the notice of motion is defective;

(b) That counsel fees in partition suits cannot be allowed in a contested action; and,

(c) That there is no authority under Section 796 of the Code of Civil Procedure to allow any counsel fees, unless such fees have been actually paid out of pocket by the moving party.

The argument upon said objection to said motion was made by briefs by the respective parties, which briefs being closed, the court is now called upon to rule upon said objection.

The first ground of objection is rather technical because the notice evidently was understood by the counsel for the defendant to mean that the plaintiff was asking that counsel fees should be fixed and proportioned

and ordered paid by the parties respectively entitled to share in the land divided. Counsel for the plaintiff contend that there is no merit in the third ground of objection because if the Legislature intended Section 796 to require that the plaintiff to have actually paid his attorney in a partition suit before he would be entitled to an allowance of attorney's fees, cases might arise wherein he would be unable to pay his attorney and therefore could not be allowed to have the attorney's fees proportioned among the tenants in common. While of course in the construction of a statute the court will not construe it so as to make it seem absurd, still where the language is plain and unambiguous the court is not allowed to change the meaning of the statute by putting a construction upon it that would be in contravention to the meaning as expressed in the language of the statute. If the Legislature by statutory enactment has brought about conditions that may work a hardship upon a litigant the courts have no right to relieve the plaintiff from such hardship by putting a different meaning upon the statute than that meant by the Legislature. The statute says: "Reasonable counsel fees expended by the plaintiff," but the defendants ask the court to construe the meaning of the word "expended" to mean

"incurred". Of course the word "expended" and the word "incurred" are not equivalent and therefore they have an entirely different meaning. The Legislature has used the word "expend" in this section of the Code and I do not believe that this court or any other court has any right to substitute the word "incurred" in its place thereby giving an entirely different meaning to the statute than that which seemed to be in the mind of the Legislature at the time of the enactment of the statute.

The second objection, "That counsel fees in partition suits cannot be allowed in a contested action" is one that has been passed upon by the highest courts of the several states of the Union. From a few of which I will quote before passing upon this ground of objection.

In Jones v. Young (Ill. 1907), 81 N. E. 1042, 1044, the decision is based upon a statute which reads as follows:

"The court, having regard to the interest of the parties and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action including reasonable counsel fees which shall be paid to plaintiff's counsel unless the court award some

part thereof to other counsel for services in the case for the common benefit of all the parties; and execution may issue therefor as in other cases." That statute is very similar to ours. And the court said in construing it, "Now it is evident, we think, from the language of this section, in connection with its history, that the services of the plaintiff's counsel in partition proceedings, for which the court may make an allowance and cause the same to be taxed along with the costs and expenses which may accrue in the action, are such services as are rendered for the common benefit of all the parties in the case." * * * So that no counsel fee, whether to the plaintiff's counsel or otherwise, can be allowed by the court and taxed as costs in the case, under this section, unless the services were rendered for the common benefit of all the parties. * * * The compensation of counsel for services in the trial of contested cases was not the end in view."

In Grubbs' Appeal, 82 Pa. St. 23, decided by the Supreme Court of Pennsylvania, the statute being construed read as follows:

"The costs in all cases of partition in the Common Pleas or Orphans' Court of this Commonwealth, with a reasonable allowance to the plaintiffs or petitioners of counsel fees,

to be taxed by the court, or under its direction, shall be paid by all the parties in proportion to their several interests,"

which is another statute very similar to ours. The following language which appears in the decision may well be applied to this case, wherein it is said:

"That defendant denied plaintiffs' right to have the partition sought for and resisted with all the power and ingenuity of some of the best legal talent of the state, plaintiffs' obtaining his judgment. To this resistance of plaintiffs' right, all manner of legal objections that the highest character of legal acumen could suggest were called in aid, both in the court below and in the Supreme Court. The plaintiffs, (as in this case), however, obtained their judgment and partition was had."

"The original action between these parties was partition, which resulted in the allotment of the premises involved in it to the defendant. An application was then made for the allowance of the fees of the counsel for the plaintiffs for professional services in the action. An auditor was appointed on this application, and on the 31st of March, 1875, he made a report fixing the sum for counsel fees to be taxed as costs in the case

at $2500.00. On the 4th of September, 1875, the report was confirmed by the Common Pleas. The plaintiffs appealed on the ground that the allowance was inadequate, the claim on their behalf having been $6000, and the defendant appealed, on the ground that the allowance was excessive, claiming that 'the auditor should only have allowed such fee out of the estate as would compensate the attorneys for services rendered in the conduct of the proceedings had there been no contest'."

In construing the section under consideration the court said:

"There is no room for doubt as to what the Legislature intended by this enactment. While in the ordinary course of practice, a partition was for the benefit of all the owners of the property divided, before the act the entire burden of the compensation of counsel for conducting the formal proceeding was thrown upon the plaintiff in the Common Pleas or the petitioner in the Orphans' Court. In every case professional aid was indispensable, and the purpose of the statute was to divide the cost of the employment of that aid amongst the parties equally benefited by the result of the proceedings. But it was indispensable aid only that was contemplated—such usual and accustomed serv-

ice as the exigencies of each case should render necessary. The compensation of counsel for services in the trial of contested causes was not the end in view. It would be a novel and anomalous feature in our legal system to have such compensation 'taxed by the court'. It is a settled rule that a successful party cannot be allowed even by a jury, in the extremest cases for such expenses. The act had relation to costs capable of calculation and ascertainment, and not to such fees as counsel and client are accustomed of themselves to adjust. In its very title, indeed, it was stated to be 'relative to costs in cases of partition'. The services for the performance of which the statute was meant to provide were searches, formal motions, the preparation of papers and conveyancing—in a word, for such professional duties as would properly enter into the bill of costs of an attorney under the English practice. * * * In proceedings in partition a common benefit is secured to all the parties. The natural and obvious object of the statute was to enforce a contribution from each, proportioned to his share of the common service rendered to them all. Each of the parties would thus pay for the aid he had received. If counsel fees for conducting an expensive contest

against him were to be allowed, he would be paying for hostility and attack, and not for aid. It would be straining the law to give it such a scope. Legislative enactments are to be expounded as near to the use and reason of the prior law as may be, when this can be done without violation of its obvious meaning; for, say the cases, it is not to be presumed the Legislature intended to make any innovation upon the common law further than the case absolutely required. Manifestly, this statute was not designed to shoulder upon defendants in partition the expenses incurred by a plaintiff in adversary litigation."

In the case of Loveland v. Loveland, 96 Ill. App. 488, the court said in discussing this subject:

"The theory upon which compensation for services of any kind are charged against a person is that the services have been of benefit to such person. But, how can it be claimed that services of an attorney promoting the interests of one litigant as against the other can be of service to both litigants? Unquestionably the services are of no benefit to the litigants whose interests are opposed by the attorney for the plaintiff."

In Lilly v. Shaw, 59 Ill. 72, the court says:

"It does not affect the question, that this was begun as an amicable suit, when it immediately developed into the ordinary case of adverse parties. The court surely could not have intended to allow appellees, two of the three solicitors who filed the petition, the enormous sum of $1200 for merely filing the petition. If he did not, then the order is to compel appellants to pay for the services of counsel whose principal efforts were on behalf of the opposite party, and against them. It would be a novel addition to the quantum meruit count, for professional services to go into our form books running thus: 'for the work, labor and professional services of plaintiff, as an attorney at law, done and performed as such attorney in a certain suit lately pending, etc., of A. B. against the said defendant, at the request of, for, and in behalf of the said A. B.'"

In Ernst v. Ernst, 192 Mo. App. 256; 132 S. W. 102, the court said:

"This law is based upon the idea that the attorney has acted for the benefit of all the parties in interest in the entire estate. Therefore services which such attorney may render on contested and antagonistic issues are valuable to those whose interests are being

served, and should not be included in the allowance against all of the interests in the suit."

In the case of Thirwell's Administrator v. Campbell, 74 Ky. 163, it was said:

"The statute is only intended to apply to that class of cases where the parties have a common interest, and a part, without objection from the others, prosecutes suits for their joint benefit, and only to such parties as are not represented in the case by attorneys selected by themselves. One jointly interested cannot be compelled to pay for counsel employed by others, when he has himself employed counsel to represent his interest."

In 12, Am. and Eng. Ann. cases, page 855, it is said: "It is well settled that where the complainant's or petitioner's right to partition is contested in good faith, the court has no right to make an allowance to the complainant or petitioner for attorney's fees inasmuch as it is regarded improper to tax the contestant with the fees of an adverse attorney."

The reason for the allowance of attorney's fees to the plaintiff in a partition suit seems to be that where the suit, although adverse in form, is in effect a friendly suit and the defendants are not therefore represented by

counsel, the law then presumes that the attorney for the plaintiff acts for the common benefit of all parties in interest and therefore they should bear their proportionate share of the expense. But from the language of the decisions I have quoted and many others to which counsel have referred in their briefs, which it seems unnecessary to quote in this opinion because it would make it unnecessarily long, it seems to be the settled law that in controverted cases where there is a real controversy between the parties and where there is a propriety in a defendant being represented by counsel of his own, the court has no right to add to his burden a proportionate share of attorneys' fees incurred by the plaintiff in this action. This court is compelled to realize and determine that it was a real controversy between the parties in this case, because the right on the part of the plaintiff to maintain this action was based upon a very drastic law that, where a corporation had lost its franchise and there being no law provided for the revivorship of the corporation the property belonging to the corporation became immediately invested by operation of law in the shareholders of the corporation in proportion to their respective interests, subject to the payment of the debts of the corporation

by the members of the board of directors who were under the law made trustees for the purpose of paying off the debts of the corporation. The plaintiff in this action holding but a one-seventh interest in property worth probably over a million dollars, took advantage of the opportunity presented, when the forfeiture of the franchise of the corporation occurred, to commence this action for partition and has eventually caused the completion of such partition, except the final judgment in this case.

Counsel for the plaintiff contend that the case of Watson v. Sutro, 103 Cal. 170, "entirely disposes of the objections of the defendants and although this case was decided thirty-two years ago, it is significant to note that our opponents made no reference to it in their brief or upon oral argument," and in that case the judge who wrote the decision said: "This is an appeal by Adolph Sutro from that portion of a judgment in partition proceedings that awards to the plaintiff in the action an attorney's fee of $5000.00. In the trial of the action of partition the amount of the respective equitable interests of plaintiff and appellant Sutro to the realty involved in the litigation was warmly contested, and as to such matters the litigation resulted adversely to this appellant.

At the hearing, the report of the Referees was acquiesced in by all the parties in interest, and the only contest that was made was as to the amount which should be allowed to plaintiff under Section 796 of the Code of Civil Procedure for reasonable counsel fees expended by him for the common benefit." * * * "There is a sharp conflict in the evidence as to what would be a reasonable attorney's fee for the labor performed, and under these circumstances we will not disturb the judgment." It will therefore be seen that the only objection under consideration by the Supreme Court in that case was as to the reasonableness of the amount of attorneys' fees allowed and not as to whether the plaintiff in a contested case was entitled to attorneys' fees.

It does not seem to me that it is necessary to refer to the other cases cited by plaintiff's counsel, because none of them seem to me to support her argument that the court must under our statute allow attorneys' fees for her attorney in a controverted case. On the contrary, it seems to me that the cases from which I have quoted, and all other cases that have been cited by counsel bearing directly upon the real point in question in this matter, based upon statutes that are substantially the same as ours, have unquestionably held

that a plaintiff in a controverted case involving a real controversy is not entitled to a judgment apportioning her attorneys' fees, or, in other words, to require of the defendants the payment of any portion of her attorneys' fees.

The objection is sustained.

S. E. Crow, J.